SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 790

PROVISION SALESMEN AND DISTRIBUTORS UNION, LOCAL 627, APPELLANT

v.

UNITED STATES OF AMERICA, *et al.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR REHEARING

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Pursuant to Rule 58 of the Rules of this Court, appellant hereby petitions for a rehearing of the decision made on January 27, 1969, granting the Government's motion to affirm and affirming the judgment of the district court.

Reasons for the Grant of Rehearing

The Government's motion to affirm was received by appellant's counsel on January 16, 1969. On Thursday, January 23, 1969, our brief in opposition to that motion was received by the Clerk of this Court. The Court's decision was announced on Monday, January 27, 1969.

This chronology suggests strongly that, pursuant to Rule 16, the Court proceeded to decide the case on the basis of the Jurisdictional Statement and motion to affirm without having had the opportunity to consider appellant's

brief in opposition or relate the conflicting arguments advanced in the two briefs to the single copy of the record available to the Court.

Although the Jurisdictional Statement herein sets forth the issues presented, it is difficult in the normal course of events for a Jurisdictional Statement to anticipate and answer the specific arguments which may be made in a subsequent motion to affirm. Here it is particularly difficult because the presentation to the district court was made prior to this Court's decision in *American Federation of Musicians* v. *Carroll*, 391 U. S. 99, and the essential thrust of the Government's presentation below was quite different from its argument in support of the motion to affirm in this Court.

The assertion in the Government's motion that the district court merely "applied settled principles to fully-supported findings of fact" is superficially appealing. It is only upon analysis of both the findings and the uncontradicted trial evidence—an analysis which we could not make in the Jurisdictional Statement but which we believe is persuasively contained in our brief opposing the motion to affirm—that this assertion is shown to be totally unfounded:

1. Although the Court below concluded that the appellant Union had "no legitimate labor objective" (F. 51, C. 3) in negotiating minimum owner-driver discounts and requiring owner-drivers to become union members, this bald conclusion is wholly unsupported either by the Court's own factual findings or by the uncontradicted evidence, both of which establish the contrary. The district court neither found nor concluded that there was no economic interrelationship between owner-drivers and employee drivers, and its factual findings would not support any such conclusion.

2. The district court's conclusion as to the absence of "legitimate labor objective" rests on its findings that in 1946 when the first owner-drivers of the three defendant corporations voluntarily joined the Union, they were not solicited into membership by the Union and they did not then pose a threat to employee wage standards or job security (F. 44-46). The motion to affirm relies on these same findings, which are explicitly limited to the period ending in 1946. But both the district court and the Government overlook the fact—also found by the district court—that the challenged contract provisions were first negotiated a full three years later (F. 52, F. 55); and there is neither finding nor evidence that in 1949 or thereafter the requiste economic interrelationship did not exist or that the owner-drivers did not then represent a threat to employee jobs or standards. Indeed, the district court did find that by 1949—contrary to the situation in 1946—appellant was actively seeking to have owner-drivers become Union members (F. 55).

3. The district court's own factual findings establish an economic interrelationship between owner-drivers and unionized employee drivers sufficient, under this court's decisions, to justify the challenged contract provisions. The court found that the corporate defendants did transfer house routes and house accounts from employee drivers to owner drivers and that the owner-drivers were also in competition with unionized drivers employed by other manufacturers (F. 47, F. 48). In light of these findings, the district court's conclusion that the Union had "no legitimate labor objective" cannot be sustained. *Milk Wagon Drivers Union* v. *Lake Valley Farm Products, Inc.*, 311 U.S. 91; *Local 24, Teamsters Union* v. *Oliver*, 358 U.S. 283; *American Federation of Musicians* v. *Carroll*, 391 U.S. 99.

4. The uncontradicted evidence establishes a job and wage competition between the owner-drivers and three groups of unionized employee drivers more direct, comprehensive and pervasive, than in any case decided by this Court, including *Carroll, Lake Valley* and *Local 24 Teamsters Union* v. *Oliver,* 358 U.S. 283. The nature and scope of this interrelationship is set forth in appellant's brief in opposition to the motion to affirm. Nothing in the district court's findings is to the contrary.

5. *United Mine Workers* v. *Pennington,* 381 U.S. 657 and *Los Angeles Meat Drivers Union* v. *United States,* 371 U.S. 94, cited in the Court's decision, are inapposite. Unlike the Los Angeles "grease peddlers" case, appellant herein has not stipulated as to the absence of economic interrelationship with employee drivers, nor are there factual findings supporting any such conclusion. Whereas in that case, this Court could say that the two groups had "essentially different sources of supply and different classes of customers" (371 U.S. at 98), here the source of supply and the class of customer was identical for both groups (F. 13, 15, 16, 17, 21, 24, 32, 47, 48). It has neither been stipluated nor found that the appellant Union's actions since 1949 have not been directed at protecting employee standards or jobs, or that they are not reasonably calculated to achieve this objective. Nor is the challenged conduct herein part of a pattern of customer allocation and similar predatory practices, as in the "grease peddler" case. Moreover, in that case this Court pointedly noted the absence of any employer threat to convert employees into owner-drivers (371 U.S. at 98). Here the employers did convert house employees into owner-drivers and house routes into owner-driver routes (F. 48). And in contract negotiations with their employee drivers, they regularly threatened to convert house drivers into owner-drivers in order to keep down the driver wage scale (Tr. 1387-

1389). It is difficult to conceive of any more direct or intimate interrelationship.

Unlike *Pennington*, Local 627 did not seek to drive anyone out of business or agree to impose any bargaining terms on employers in other bargaining units. The negotiation of minimum owner-driver discounts, in reality a regulation of wages for physical labor performed, constituted an appropriate means to protect the standards of interrelated unionized drivers. The Government's motion to affirm does not advance any contention to the contrary, urging merely the unfounded, unsupported argument that the requisite interrelationship did not exist.

CONCLUSION

The foregoing points are buttressed by our brief in opposition to the motion to affirm which discusses in greater detail the findings, the uncontradicted evidence and the applicable legal principles. Based upon the foregoing and the arguments more fully developed in that brief, we respectfully urge that there are substantial issues meriting the fuller consideration of this Court, that the decision below is clearly erroneous and totally irreconcilable with this Court's prior decisions, that this petition for rehearing should be granted, and that upon such reconsideration the motion to affirm should be denied.

Respectfully submitted,

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The undersigned counsel for Appellant hereby certify that the above petition for rehearing is presented in good faith and not for delay.

Dated: February 17, 1969

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